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No. 89-658

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN L. CHEEK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether in this prosecution for willful violations of the tax laws, in which it was shown that petitioner was repeatedly made aware of his obligation to file income tax returns and to pay taxes, the district court erred in instructing the jury that willfulness may be negated by a good faith misunderstanding of the law only if petitioner's asserted misunderstanding was objectively reasonable.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 882 F.2d 1263.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16) was entered on August 21, 1989, and the petition for a writ of certiorari was filed on October 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of three counts of willfully attempting to evade taxes for the years 1980, 1981, and 1983, in violation of 26 U.S.C. 7201; one count of making a false claim against the government for income tax withheld in 1982, in violation of 18 U.S.C. 287; and six counts of willfully failing to file income tax returns for the years 1980, 1981, and 1983 through 1986, in violation of 26 U.S.C. 7203. Pet. App. 1-2. The court sentenced petitioner to imprisonment for one year and one day and probation for five years. It also ordered him to pay the costs of the prosecution, in the amount of $3,576.66. *Id.* at 18-19. The court of appeals affirmed. *Id.* at 1-15.

1. The evidence at trial showed that petitioner, an airline pilot, properly filed federal income tax returns for the years 1969 through 1979. Thereafter, he engaged in tax protest activity. He did not file returns for the years 1980 through 1986 (other than a frivolous return for 1982); he filed frivolous W-4 forms claiming an increasing number of withholding allowances, eventually claiming 60; and he then claimed on his W-4 form that he was completely exempt from taxation. Pet. App. 2; see Tr. 339-354.

Petitioner also filed civil suits against his employer, the Internal Revenue Service (IRS), and federal officials. For example, in March 1982, petitioner and another American Airlines employee sued the company and three of its employees for withholding federal taxes from his paycheck. On October 29, 1982, the district court dismissed the complaint as frivolous and ruled that the defendants' withholding of taxes from the plaintiffs' salaries was proper. Tr. 368-372.

In April 1982, petitioner sued the IRS in Tax Court, claiming, *inter alia*, that he was not a taxpayer or a "person," that his salary from American Airlines was not wages, that individuals are not subject to income taxation because the word "direct" does not appear in the Sixteenth Amendment, that he was not subject to taxation because he is a sovereign individual, and that the tax laws are ineffective because there is no enforcement clause in the Sixteenth Amendment. Tr. 583-594. During the trial in March 1984, the judge told petitioner that his arguments were frivolous and contrary to law and that courts across the country had consistently rejected them. Tr. 590-594.

Also in March 1984, a federal district court issued an opinion in a separate civil action brought by petitioner and four other persons against the United States and the Commissioner of Internal Revenue, in which the plaintiffs alleged that wages are not income and that the withholding of taxes from their wages and payment of those taxes to the government violated the Sixteenth Amendment. The district court dismissed the action and pointed out that the plaintiffs' argument that wages are not income had repeatedly been held to be without merit. Tr. 630, 634-635; see *Schaut* v. *United States*, 585 F. Supp. 137, 139 (N.D. Ill. 1984).

In yet another case, brought against various IRS defendants, the district court, in a decision dated June 16, 1986, not only found petitioner's position frivolous, but also fined him $10,000 for bringing the suit. Pet. App. 2; Tr. 677. The court imposed sanctions because petitioner had unsuccessfully raised essentially the same arguments in the previous action decided in March 1984. Tr. 678. The Seventh Circuit

found petitioner's abuse of the system "egregious" and fined him $1500 for bringing a frivolous appeal, but it reduced the district court's fine to $5000. *Cheek* v. *Doe*, 828 F.2d 395, 398, cert. denied, 484 U.S. 955 (1987).[1]

Two attorneys testified at trial that they had discussed the law of taxation with petitioner. Tr. 959-977, 997-1031. One testified that, beginning in 1981, she discussed constitutional issues of taxation with petitioner, who had done a great deal of research on the topic. She also testified that she told petitioner that laws are binding until they are overturned and warned him that his acts could "get him into trouble" and that he could "face a criminal prosecution." Tr. 971-977. The other attorney testified that he told petitioner that the courts had rejected as frivolous the claim that wages are not income. Tr. 1034-1035. He also told petitioner that one of the ways to attack the system from a constitutional standpoint was to sue for damages after the money has been withheld. Tr. 1018.

Petitioner testified, *inter alia*, that he spent a great deal of time researching this Court's decisions and that he was trying to obtain jurisdiction to test his beliefs in this Court. Tr. 1010-1013, 1205-1227. Petitioner also testified that he believed income taxes to be entirely voluntary and that because he had seen no decisions of this Court holding that wages are income, he believed that they are not. Tr. 1272, 1278.

2. a. The district court instructed the jury that, under the statutes under which petitioner was charged, the term "willfully" means "a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent." Pet. App. 20; Tr. 1684, 1688. The court continued (Pet. App. 3, 20):

> An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.
>
> Disagreement with the law does not constitute a good faith misunderstanding of the law because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

The district court also gave an instruction (No. 53) on petitioner's theory of defense. The court drafted that instruction for petitioner, who represented himself at trial. It discussed, among other things, petitioner's claimed belief that he was not a taxpayer, that his wages did not constitute income, and that he was not required to file tax returns. Pet. App. 3, 21. The instruction also referred to a contention by petitioner "that he has been attempting to test the constitutionality of the income tax laws as well as the applicability of the tax laws to him and he cannot do so by filing tax returns." *Id.* at 21.

b. The jury began its deliberations on the morning of November 10, 1988. At 3:00 that afternoon, it sent out a note requesting a transcript of petitioner's testimony in which he discussed his beliefs. The court

[1] Petitioner also appeared at criminal tax trials of other persons. Pet. App. 2.

denied that request. Pet. App. 3. Later, at approximately 4:15 p.m., the jury sent out a second note, which stated in part (*Id.* at 23):

> We have a basic disagreement between some of us as to if [petitioner] honestly & reasonably believed that he was not required to pay income taxes.
>
> We have struggled with this point for part of the morning & the entire afternoon with no movement.
>
> Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?
>
> Page 53 [the defense instruction] is the one we cannot get by as to his belief.

During the ensuing discussion, the government pointed out that the court had omitted instructions that a person's opinion that the tax laws violate his constitutional rights and disagreement with the government's tax collection do not constitute good faith misunderstanding of the law. The court's response to the jury's note included those instructions. Pet. App. 4. The jury informed the court in another note at 7:10 p.m.: "We are divided on the issue as to if [petitioner] honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision." *Id.* at 24-25.

The jury returned on November 12, and the government requested the court to clarify its instructions before the jury resumed its deliberations. The court then gave the jury a second supplemental instruction. That instruction stated, *inter alia*, that "an honest but unreasonable belief is not a defense and does not negate willfulness," and that "advice or research resulting in a conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." Pet. App. 4, 25-26. The court also repeated its instructions that disagreement with the law is not a defense "because it is the duty of all persons to obey the law whether or not they agree with it," and that "[p]ersistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law." *Id.* at 26. The jury deliberated for another 2½ hours and then returned a verdict of guilty. *Id.* at 4-5.[2]

3. On appeal, petitioner contended, *inter alia*, that a misunderstanding of the law need not be objectively reasonable in order to negate willfulness.[3] Although

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[2] The jury submitted several notes that it wanted the court to read after the verdict was announced. Before reading the notes, the court polled the jury, and each juror affirmed that the guilty verdict was his or her own. Pet. App. 4-5. The court then read the notes. The first, signed by all 12 jurors, stated in part: "Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law." *Id.* at 27. The second note, from one of the jurors, stated: "I feel [petitioner] is a reasonable person and sincerely believes in his cause. * * * I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law." *Ibid.* The last note, from another juror, contained two phrases. The first read: " 'Honest and Sincere in His Cause'—He is *Guilty*." The second read: "Not 'Objectively Reasonable' He Is Guilty." *Ibid.* After reading these notes, the court polled the jury again, and no juror expressed disagreement with the verdict. *Id.* at 5-6.

[3] Petitioner also raised the following claims, all of which were rejected by the court of appeals: (1) that it was error

it recognized that other courts of appeals had reached a contrary result, the court below rejected petitioner's position, pointing out that, "in recent years," the court had "emphatically adhered to the 'objectively reasonable' standard." Pet. App. 6-7. In rejecting petitioner's further claim that the district court had erred in reinstructing the jury, the court of appeals also held that "the beliefs that wages are not income and that the tax laws are unconstitutional are not objectively reasonable as a matter of law." *Id.* at 9.

DISCUSSION

The district court's instruction that petitioner's asserted misunderstanding of the law must be objectively reasonable in order to negate willfulness was proper. As petitioner points out (Pet. 14-18), and as the court of appeals acknowledged (Pet. App. 6-7), however, the ruling below approving that instruction conflicts with the decisions of other courts of appeals. For that reason, and because the question presented is important to the fair and uniform enforcement of the criminal tax laws, we suggest that the Court grant the petition for a writ of certiorari.

1. The nature of the tax laws and of tax administration is such that a person should not be held to

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for the district court to reinstruct the jury; (2) that the district court lacked subject matter jurisdiction; (3) that petitioner was denied his right to counsel because he "could not find trial counsel with expertise on the Constitution and the Internal Revenue Code" and because his "friends were only allowed to act as helpers during certain stages of the trial"; (4) that there was insufficient evidence of petitioner's intent to violate the law because a juror's note had said petitioner did not believe he was breaking the law; and (5) that the court had erred in rulings on the admissibility of evidence. Pet. App. 6-15. Petitioner does not renew those claims here.

have committed a willful violation, even where his conduct was intentional and he was generally informed about the requirements of the law, if his failure to file a return or pay a tax was based on a good faith error or misunderstanding arising under the tax laws and in an effort to comply with them, as long as the error or misunderstanding was objectively reasonable. But that exception to the usual rule that ignorance of the law is no excuse should not be stretched to include petitioner's obdurate refusal, in the face of repeated and explicit warnings, to acknowledge and conform to the most basic premises of the income tax laws—premises that are almost universally respected by millions of wage earners in the United States, that were respected by petitioner himself for a decade before he commenced the course of conduct at issue here, and that are essential to our system of taxation. Petitioner's adamant refusal to file any return or to pay any taxes in these circumstances was "willful," as a matter both of common usage and legal doctrine, despite his professed subjective "belief" that he did not have to comply.

This conclusion is supported by the Court's seminal decision in *United States* v. *Murdock*, 290 U.S. 389 (1933), regarding the meaning of "willfully" under the tax laws. The taxpayer in *Murdock* refused on Fifth Amendment grounds to give testimony and supply information regarding deductions he claimed in his tax returns because to do so would incriminate him with regard to possible violations of state statutes. He was charged with violating Section 1114(a) of the Revenue Act of 1926, ch. 27, 44 Stat. 116, which is identical in all pertinent provisions to 26 U.S.C. 7203. The trial court informed the jury of its view that the government had sustained the burden

of establishing guilt, and it refused to give the following instruction requested by the defendant (290 U.S. at 393):

> If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer questions was wilful.

The Court held that, in the circumstances presented, the trial court should have given the requested instruction and should not have commented on the evidence, because the term "willfully" in the statute meant more than voluntarily. 290 U.S. at 394-397. The Court explained (*id.* at 394-395):

> The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose * * *; without justifiable excuse * * *; stubbornly, obstinately, perversely * * *. The word is also employed to characterize a thing done without ground for believing it is lawful * * *, or conduct marked by careless disregard whether or not one has the right so to act.

This definition of willfulness has both subjective and objective components. For example, the standard of recklessness it incorporates—which is one of "careless disregard" for whether the law afforded the defendant the right to act in the way he did—furnishes an outer limit on the extent to which the defendant's subjective "belief" in the lawfulness of his conduct may negate the element of "willfulness." Moreover, the phrase "stubbornly, obstinately, perversely" aptly describes petitioner's conduct in this case, in the face of the courts' specific and repeated rejection of his legal objections. And of particular relevance in *Murdock* itself, the Court did not state that a willful act is a thing done without *believing* it lawful; the Court stated that a willful act is a thing done without *ground for believing* it lawful. Because the Court found that the state of the law with regard to whether one under examination in a federal tribunal could refuse to answer on account of probable incrimination under state law was not settled at the time the taxpayer acted, the Court held that "[t]he trial court could not * * * properly tell the jury the defendant's assertion of the privilege was so *unreasonable* and *ill-founded* as to exhibit bad faith and establish willful wrongdoing." 290 U.S. at 396 (emphasis added).

Petitioner's argument to the contrary is primarily based on the statements in *United States* v. *Bishop*, 412 U.S. 346, 360 (1973), and *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976), that the term "willfully" in the tax laws means a "voluntary, intentional violation of a known legal duty." See Pet. 12, 13. There can be no doubt here, however, that petitioner's conduct was intentional. Nor can there be any doubt that he "knew" what his legal duties were, in the sense of knowing what was expected of him under the tax laws as they had been construed by the courts and were almost universally understood by other citizens. The criminal tax laws do not require that any more be shown. The decision below, requiring that any assertedly good faith error or misunderstanding of law in circumstances such as these at least be objectively reasonable, is therefore consistent with *Bishop* and *Pomponio* as well as *Murdock*.

The decision below also is consistent with the policies underlying the Court's articulation of standards of willfulness in the criminal tax laws. Section 7201 of the tax code, which the jury found that petitioner violated in all three years charged, is "the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency." *Spies* v. *United States*, 317 U.S. 492, 497 (1943). Congress's decision to confine criminal sanctions to willful violations reflects the practical reality that "the [tax] law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appears from the number who make overpayments." *Id.* at 496. Accordingly, "[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *Ibid.* This policy was reiterated in *Bishop*, where the Court stated that its "consistent interpretation of the word 'willfully' to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the wellmeaning, but easily confused, mass of taxpayers." 412 U.S. at 360-361.

There is no question, therefore, that an innocent or negligent oversight is not to be equated with willfulness. See, *e.g.*, *United States* v. *Aitken*, 755 F.2d 188, 191 (1st Cir. 1985). The instant case, and other similar cases decided by the Seventh Circuit, however, present a different issue. This case involves a deliberate refusal to comply with the basic requirements of the tax law (based on a wholly unreasonable view of that law), not an "innocent error" in the

application of its technical provisions. In these circumstances, a defendant who persists in obdurate refusal to acknowledge what the law is, *United States* v. *Davenport*, 824 F.2d 1511, 1518 (7th Cir. 1987), is no less culpable than a defendant who acknowledges what the law is but violates it because he disagrees with it.

The Seventh Circuit has implemented these principles by requiring that a taxpayer's mistaken belief about his legal duty be objectively reasonable in order to negate willfulness. See, *e.g.*, *United States* v. *Buckner*, 830 F.2d 102, 103 (7th Cir. 1987). This "reasonableness requirement is intended to give the jury a method by which they can distinguish between a bona fide misunderstanding of the law and obdurate refusal to acknowledge (present in so many tax protester cases) what the law indeed does require." *Davenport*, 824 F.2d at 1518 (quoting *United States* v. *Bressler*, 772 F.2d 287, 291 n.2 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986)). This approach is consistent with *Murdock*, which explicitly describes willful conduct as including that which is engaged in "stubbornly, obstinately, [or] perversely," "without ground for believing it is lawful." 290 U.S. at 394-395.

2. The Second Circuit has taken the same position as the Seventh Circuit on this issue. See *United States* v. *Schiff*, 801 F.2d 108, 112 (2d Cir. 1986), cert. denied, 480 U.S. 945 (1987) ("While we conclude that the 'basis' instruction did not impose an objective reasonableness test on Schiff's assertion of good faith, we also conclude that even if such a test had been imposed by the instruction, that would not have been error.").

As petitioner points out (Pet. 14-16), and as the court of appeals acknowledged (Pet. App. 6-7), how-

ever, other courts of appeals that have addressed this issue have held that a purely subjective test must be applied to a defendant's claimed "belief" that he does not have to file a return or pay income taxes on wages. Under that test, any good faith error or misunderstanding of law, no matter how unreasonable, negates the element of willfulness. See *United States* v. *Aitken*, 755 F.2d 188, 191-193 (1st Cir. 1985);[4] *United States* v. *Whiteside*, 810 F.2d 1306, 1310 (5th Cir. 1987); *United States* v. *Burton*, 737 F.2d 439, 441-442 (5th Cir. 1984); *United States* v. *Jerde*, 841 F.2d 818, 822 (8th Cir. 1988); *United States* v. *Phillips*, 775 F.2d 262, 263-264 (10th Cir. 1985).[5] Other courts have expressed a similar view, albeit without squarely addressing the precise situation and issue presented here. *Yarborough* v. *United States*, 230 F.2d 56, 61 (4th Cir.), cert. denied, 351 U.S. 969 (1956); *United States* v. *Sassak*, 881 F.2d 276, 279 (6th Cir. 1989); *Battjes* v. *United States*, 172 F.2d 1, 4 (6th Cir. 1949); *United States* v. *Mueller*, 778 F.2d 539, 541 (9th Cir. 1985); *Cooley* v. *United States*, 501 F.2d 1249, 1253 n.4 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975).[6]

The courts whose decisions conflict with those of the Seventh Circuit have reached that result primarily by mechanical application of the Court's statement that "willfulness in this context simply means a voluntary, intentional violation of a known legal

[4] See also *United States* v. *Hogan*, 861 F.2d 312, 316 (1st Cir. 1988).

[5] See also *United States* v. *Hairston*, 819 F.2d 971, 972-973 (10th Cir. 1987).

[6] But see *United States* v. *Aguilar*, 871 F.2d 1436, 1449-1450 & nn.5, 6 (9th Cir. 1989).

duty." *Pomponio*, 429 U.S. at 12. None has addressed the language in *Murdock*, quoted above, that speaks directly to the present situation, or acknowledged that a person in petitioner's position "knows" his legal duty within the meaning of the *Pomponio* formulation, even if he does not subjectively "believe" it.[7]

The conflict among the courts of appeals regarding the propriety of an instruction requiring that the defendant's error or misunderstanding of law be objectively reasonable warrants resolution by this Court. The vexing issue of how to apply the element of willfulness in this setting is one of recurring importance, as evidenced by the number of "tax protester" cases in which the issue has arisen in recent years. See Pet. 16-18. The issue is important to the

[7] Even the courts that adhere to a purely subjective standard permit the finder of fact to take into consideration the reasonableness of a claimed belief in determining whether the defendant actually acted in good faith or intended to violate the law. See *United States* v. *Turano*, 802 F.2d 10, 11 (1st Cir. 1986); *United States* v. *Whiteside*, 810 F.2d at 1310-1311; *Cooley* v. *United States*, 501 F.2d at 1253 n.4; *United States* v. *Payne*, 800 F.2d 227, 229 (10th Cir. 1986).

In addition, the courts uniformly have held that a disagreement with the law or a belief that it is unconstitutional does not negate willfulness. See *United States* v. *Turano*, 802 F.2d at 11; *United States* v. *Schiff*, 801 F.2d at 112; *United States* v. *Snyder*, 766 F.2d 167, 170 (4th Cir. 1985); *United States*, v. *Whiteside*, 810 F.2d at 1311; *United States* v. *Burton*, 737 F.2d at 442; *United States* v. *Sassak*, 881 F.2d at 281; *United States* v. *Grumka*, 728 F.2d 794, 797 (6th Cir. 1984); *United States* v. *Miller*, 634 F.2d 1134, 1135 (8th Cir. 1980), cert. denied, 451 U.S. 942 (1981); *United States* v. *Ness*, 652 F.2d 890, 893 (9th Cir.), cert. denied, 454 U.S. 1126 (1981); *United States* v. *Harrold*, 796 F.2d 1275, 1282-1283 (10th Cir. 1986), cert. denied, 479 U.S. 1037 (1987).

fair and uniform enforcement of the tax laws in an additional sense as well, because it concerns the standards to which all citizens will be held with respect to their duty to act in accordance with the most fundamental and universally applicable premises of our tax system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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